Each of the incumbent LECs' claims is thus a transparent effort to avoid the central and undisputed facts. At present, in the few areas in which unbundled network elements and combinations of those elements have been ordered to be provided by state commissions, mass market entry is beginning.[52] In the vast areas of the country where those elements and element combinations are unavailable, no such entry has occurred, and no such entry will soon occur. The Commission's decision in this proceeding will determine which of those two paths the country will now follow.

II. THE INCUMBENT LECS' PROPOSED INTERPRETATIONS OF THE "IMPAIRMENT" STANDARD OF SECTION 251(d)(2)(B) IGNORE THE STATUTORY LANGUAGE AND WOULD DEFEAT THE ACT'S PURPOSES.

There can be no serious dispute about the outcome of this proceeding if Section 251(d)(2)(B) is construed according to its plain terms. The incumbent LECs' principal focus, therefore, is to attempt to persuade the Commission to engage in a wholesale rewriting of the statute. Section 251(d)(2)(B) directs the Commission to "consider" merely whether CLECs will be "impaired" in their "ability to provide the services [they] seek to offer" by an incumbent

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(. . . continued)
"that CLECs provide, on average, about a quarter of their lines over their own facilities." *FCC Local Competition Report* at 19.

[52] *See, e.g.*, MCI WorldCom at 53 (noting that in New York MCI WorldCom "already has in excess of 40,000 residential customers serviced through the platform, with another 20,000 customers expected . . . next month"); CompTel at 49 (noting that the number and scope of customers to be served by its members is "significantly higher" where the platform is available, because at this point "only UNE-P presents a viable mass market strategy").

LEC's "failure to provide access" to a network element.[53] By contrast, the incumbent LECs contend that no element may be unbundled unless the Commission "finds" that the element is "essential to competition and there is convincing evidence that CLECs cannot effectively compete" without it.[54] One would search the incumbent LEC comments in vain for even an attempt to relate their proposed standards to the statutory text.

The plain terms of that text require that the Commission conduct a *comparison* between the ability of CLECs to provide service if they are granted access to network elements with their ability to do so if they are denied such access. None of the incumbent LECs even attempts to make that comparison. It is thus uncontested that CLECs will be unable to provide competitive service as quickly, as broadly, or as effectively if they are denied access to the original seven network elements – and that denial of such access would thus "impair" CLECs' ability to provide service, in both the dictionary and common sense understandings of that term, by "diminish[ing]" that ability.[55]

The incumbent LECs' response to these facts is to urge the Commission to adopt a construction of "impair" that is contrary to the statute's terms and would impose a bar to unbundling far more restrictive than any that term could reasonably bear. BellSouth, for example, asserts that "impair" is a "strong word[]" "intended to create a high threshold."[56] But that is

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[53] *See* 47 U.S.C. § 251(d)(2)(B).

[54] *See* GTE at 3-4.

[55] *See* AT&T at 28-29 (quoting Webster's Third New International Dictionary at 1131).

[56] *See* BellSouth at 7, 9.

wishful thinking. A carrier is "impaired" by the absence of access to network elements whenever its ability to provide service is "diminished" or "made worse." *See supra* note 55. That is the antithesis of a "high threshold."[57]

Indeed, the incumbent LECs' failure to suggest a plausible interpretation of the "impair" standard of Section 251(d)(2)(B) is most vividly exposed when they proceed to propose interpretations of the "necessary" standard of Section 251(d)(2)(A). It is plain that Congress intended to impose a somewhat higher threshold under the "necessary" standard for proprietary elements than under the "impair" standard for non-proprietary elements. But the incumbent LECs have proposed such restrictive interpretations of "impair" that, when they get to "necessary," they are already trapped against the ceiling and have no room to go any higher. Thus, for example, Ameritech is actually driven to deny, contrary to the terms' plain meaning and the statute's structure, that there is "any distinction between the concepts of 'necessity' and 'impairment.'"[58] SBC likewise contends that there is no "substantive" distinction to be drawn between the two

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[57] The "necessary" standard, in contrast to the "impair" standard, is not relevant to this proceeding. The "necessary" standard applies only to "proprietary" elements, and no such elements are at issue here. The incumbent LECs advocate, in the abstract, expansive interpretations of the term "proprietary." *See, e.g.*, GTE at 25-27; SBC at 11-15; U S WEST at 23-26; Ameritech at 39-40, 44, 84-86, 96. However, with the exception of a couple of features relating to the switch or shared transport, where their claims are demonstrably wrong – such as line class codes (SBC) and routing tables (Ameritech) – none of them makes any specific claims that any of the original seven network elements are proprietary. AT&T addresses isolated claims that particular elements are proprietary in the portions of these Reply Comments that address those elements. *See infra* pp. 91 n.192, 113-14.

[58] *See* Ameritech at 37; *see also id.* at 32 (urging the Commission to find that the "impair" standard "require[s] unbundling only in those circumstances in which it is *necessary* for viable competition") (emphasis added).

standards, and that the only difference is that the "necessary" standard "require[s] a higher degree of proof" of the same factual test.[59] And USTA's affiants, struggling to maintain the semblance of a distinction (and, presumably, a straight face), suggest that "impairment" cannot be satisfied unless a facility is "essential" while the "necessity" standard requires that the facility be "absolutely essential."[60]

As shown below, the incumbent LECs can advocate such standards only by departing wholesale from Section 251(d)(2)(B)'s plain language and the Act's purposes. In the remainder of this Section of the Reply Comments, AT&T will show that (1) there is no basis whatsoever for applying any aspect of the "essential facilities" doctrine of the antitrust laws to Section 251(d)(2), (2) the incumbent LECs' other proposed standards likewise constitute complete departures from the statutory language and the Act's purposes, (3) the factors of Section 251(d)(2) in any event are not dispositive, and need only be "consider[ed]," "at a minimum," and (4) the Commission should reject the claims that it establish an automatic sunset of the unbundling obligations it adopts in this proceeding.

A. Application Of The Essential Facilities Doctrine Would Be Contrary To The Act's Terms And Purposes

Several of the incumbent LECs contend that the existence of "impairment" should be assessed by determining whether a network element would be deemed an "essential facility" in an

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[59] *See* SBC at 14.

[60] *See* Hausman/Sidak Aff. ¶¶ 123, 130 (appended to USTA Comments). If there were a third tier, USTA would presumably require a showing that the facility be "really absolutely essential."

antitrust case[61] or by imposing an even more stringent standard.[62] By contrast, the other commenters overwhelmingly agree that the "essential facilities" doctrine of the antitrust laws does not provide an appropriate standard for determining what network elements must be made available to CLECs under Section 251(d)(2) of the Act. In addition to CLECs,[63] this view is shared by all of the state commissions that address the issue.[64]

This is not a close question. Nothing in the statutory language remotely suggests that Section 251(d)(2)(B) incorporates any aspect of the essential facilities doctrine. To the contrary, rather than apply a standard of essentiality, the provision requires only that the Commission consider whether CLECs would be "impaired" without access to an element. It would rewrite the Act to require instead a finding that an element is "essential."[65]

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[61] *See, e.g.*, GTE at 14-20; U S WEST at 6-7; Ameritech at 28-32.

[62] *See* Hausman/Sidak Aff. ¶ 22 ("The existing essential facilities doctrine sets forth necessary but not sufficient conditions for defining 'impairment' under section 251(d)(2)"). Under their approach, it would actually be easier for a competitor seeking access to obtain it under the antitrust laws than to obtain it under the Communications Act.

[63] *See, e.g.*, KMC at 8-11 ("The essential facilities doctrine is inappropriate for use in determining which elements must be unbundled"); Qwest at 48-50 ("The 'essential facilities' antitrust doctrine is not relevant to the Section 251(d)(2) inquiry"); ALTS at 32-33 ("The 'necessary' and 'impair' standards are not part of a congressional attempt to codify the 'essential facilities' doctrine"); Allegiance at 12-13; AT&T at 46-52; Choice One at 7-11; CoreComm at 23-24; Covad at 18-23; Level 3 at 7-12; MCI WorldCom at 30-37; Metro One at 13-14; Network Access Solutions at 11; NorthPoint at 10-12; Pilgrim at 10-13; Sprint at 13-16.

[64] *See* Oregon PUC at 2 ("the essential facilities doctrine does not apply in the case of section 251"); Texas PUC at 9-10 (essential facilities doctrine "does not properly fit the goals of the Act or the express provisions of § 251(d)(2)"); Vermont PSB at 6-7; Illinois CC at 7-8; Ohio PUC at 5; Washington UTC at 11-13.

[65] *See, e.g.*, AT&T at 48-50; Oregon PUC at 2; Texas PUC at 10; ALTS at 32-33; Choice One at 9-10; Level 3 at 9-10; CoreComm at 23; KMC at 9; MCI WorldCom at 30-31, 35-36; Pilgrim at

(continued . . .)

Even more fundamentally, application of the essential facilities doctrine would be antithetical to the Act's purposes. Contrary to the incumbent LECs' claims, the 1996 Act was not enacted against the "backdrop" of the antitrust laws.[66] The pertinent "backdrop" was the Communications Act that the 1996 Act amended. The Communications Act, even before the 1996 amendments, mandated substantially more sharing of facilities and services than did the antitrust laws. For example, all customers had the right to purchase services and facilities from common carriers at just and reasonable rates – set at levels that would prevail in a competitive market – and the Commission's *Resale and Shared Use* decisions established that no distinctions could be drawn in applying that principle between end user customers and the carrier-customers that would then use the services and facilities to sell services to others.[67] In particular, those decisions required common carriers to enable their competitors to purchase for resale to smaller customers their discounted high volume services – resulting in resale discounts of 50% or more, far exceeding the resale discounts that have since been set for local services under Section 251(c)(4).

(. . . continued)
10; Sprint at 14. *See also* U S WEST at 6 (acknowledging that the essential facilities doctrine and the standards of Section 251(d)(2) are "differently stated").

[66] *See* GTE at 14-15 & n.8; *see also* Ameritech at 30-31.

[67] *See, e.g.*, Report and Order, *Regulatory Policies Concerning Resale and Shared Use of Common Carrier Services and Facilities*, 60 F.C.C.2d 261 (1976) (holding that tariff provisions purporting to prohibit resale and sharing violate the Act).

The 1996 Act then built significantly on those requirements to create substantial *additional* sharing obligations for all telecommunications carriers,[68] for all local exchange carriers,[69] and in particular for all incumbent LECs – including a resale requirement that was designed not merely to permit volume-discounted services to be sold to lower volume customers, but to permit resale to any customer through a mandated wholesale discount.[70] Thus, if the incumbent LECs' arguments against sharing were valid, they would not be confined to the network element requirements of Section 251(c)(3), but would also extend to the resale requirements of Section 251(c)(4) and the remaining common carriage provisions of the Act. But because the nation's communications laws have always required sharing by common carriers that extends substantially beyond what is required by the antitrust laws, and because those obligations were themselves multiplied and strengthened by the amendments added by the 1996 Act, it is nonsense to suggest that the antitrust laws should control, or even guide, the interpretation of those 1996 amendments.

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[68] *See, e.g.*, 47 U.S.C. § 251(a) ("Each telecommunications carrier has the duty (1) to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers").

[69] *See, e.g.*, 47 U.S.C. § 251(b)(1) (imposing resale obligation on all LECs); 47 U.S.C. § 251(b)(4) (requiring all LECs to provide other carriers with access to poles, ducts, conduits, and rights of way).

[70] *See, e.g.*, 47 U.S.C. § 251(c)(2) (interconnection); 47 U.S.C. § 251(c)(3) (network elements); 47 U.S.C. § 251(c)(4) (resale); 47 U.S.C. § 251(c)(6) (collocation); 47 U.S.C. § 259 (infrastructure sharing).

Ameritech's suggestion that the purposes of the antitrust laws are "identical to the purposes of the Act" is thus absurd.[71] As the commenters point out, the essential facilities doctrine was developed by antitrust courts to serve a fundamentally different and much narrower purpose.[72] Unlike Section 251, the antitrust laws do not ordinarily require a monopolist to assist its competitors by providing access to its monopoly facilities. The essential facilities doctrine creates a narrow exception to that rule to deal with a monopolist's abuse of its control over an essential facility in an attempt to extend its monopoly by eliminating competitors in a second, adjacent market. Because the essential facilities doctrine is an exception to the general antitrust rule that even a monopolist has no duty to help its competitors, the courts have narrowly circumscribed the doctrine to situations in which access to the particular facility is "essential to the plaintiff's survival in the market" and "not available from another source."[73] As a result, the courts have only rarely applied the essential facilities doctrine, and then only in extreme cases involving the arbitrary withdrawal of access by a monopolist for the sole purpose of destroying or foreclosing a competitor in an adjacent market.[74] Here, of course, the very purpose of the unbundling requirement is to spur competition in the incumbents' own monopoly markets.

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[71] *See* Ameritech at 30.

[72] *See, e.g.*, AT&T at 49-50; Texas PUC at 9-10; Vermont PSB at 6-7; MCI WorldCom at 32-34; Covad at 20; Network Access Solutions at 11; Qwest at 49; Sprint at 15.

[73] *See* 3A Areeda & Hovenkamp, *Antitrust Law* ¶ 773b (1996).

[74] *See, e.g.*, AT&T at 49-50; Pilgrim at 11.

The incumbent LECs' principal argument for importing the essential facilities doctrine into the 1996 Act is therefore not based on statutory language or purpose, but rather their own policy views: they claim it is necessary in order to protect incumbent LECs' and CLECs' incentives to innovate. Unless unbundling is restricted to facilities that would be deemed essential under the antitrust laws, they claim, incumbent LECs will lose their incentive to innovate (because all innovations will be shared with their competitors) and CLECs will too (because they will prefer to free-ride on the incumbent LECs).[75] That policy argument would not, of course, be a proper basis for rewriting a duly enacted statute even if the policy concerns were valid. Here, those concerns have no validity in any event.

To begin with, the entire argument is based on the premise that if network elements are available, CLECs will choose to use them instead of building their own facilities.[76] As AT&T explained in its opening Comments, exactly the opposite is the case. Network elements do not provide a sustainable exclusive basis for viable long-term competition because a CLEC relying on them faces inherent cost and other disadvantages vis-a-vis the incumbent LEC. Given a viable choice, CLECs will not seek to use network elements in lieu of their own facilities, but instead will lease elements as a steppingstone to developing their own facilities, or to fill in gaps in their networks once those facilities have been deployed.[77] AT&T's own business plan – which

[75] *See, e.g.*, GTE at 16-20; Ameritech, pp. 21-27; Kahn Aff. ¶¶ 7, 11.

[76] *See id.*

[77] *See* AT&T at 23-24 & Hubbard/Lehr/Willig Aff. ¶¶ 33-34; MCI WorldCom at v ("In the real world, leasing is not a deterrent to facilities construction; it is a necessary precondition to such construction").

maximizes reliance on CAP facilities for business customers and cable facilities for residential customers – is a prime example of this reality.

Moreover, incumbent LECs would continue to have incentives to innovate in any event. When they lease network elements they will be fully compensated, under the Commission's TELRIC rules, through prices that reflect, among other things, all their efficient forward-looking research and development costs and a risk-adjusted cost of capital. And the Act itself provides protection for the public interest in innovation by requiring the Commission to consider the "necessary" standard in deciding whether to order that proprietary elements be made available.[78] In light of that provision, it makes no sense whatsoever to suggest that the value of innovation requires imposition of an even higher, "essential facilities" test for the *non*proprietary elements covered by the "impair" standard.

The incumbent LECs' second policy argument in support of the "essential facilities" doctrine is that because that doctrine is already established, the Commission could avoid having to "reinvent the wheel" in construing Section 251(d)(2).[79] Professor Kahn for example, contends that it would be too "complex" and "infeasible" for the Commission to attempt to determine a precise degree of cost disadvantage that establishes the "specific cut-off point" between "permitting or precluding competition," and that it will be simpler instead merely to determine whether a facility is essential in the antitrust sense.[80] But the alternative Kahn posits is complex

[78] *See* 47 U.S.C. § 251(d)(2)(A).

[79] *See* Ameritech at 31.

[80] *See* Kahn Aff. ¶ 19.

only because it would completely abandon the statutory test. Section 251(d)(2)(B) does not ask at what specific point the absence of an element will "prevent" competition, but rather asks whether a CLEC will be "impaired" without it. That much more modest – and more easily satisfied – inquiry does not require the "infeasible" task that Kahn erects as a strawman alternative to the essential facilities doctrine.

It is obvious that the incumbent LECs real quarrel is with the Act itself. They make no effort to hide their conviction that unbundling obligations of virtually any sort are malignant, and that all possible presumptions should be arrayed against imposing them.[81] As a result, they cease even trying to construe the Act that Congress passed, and instead urge upon the Commission a substitute Act that they wish Congress had written instead.

The incumbents' efforts to redraft the Act is perhaps most obvious in their view that the presence of a "single competitor" in a market should be a sufficient basis to foreclose unbundling in that market.[82] Professor Kahn, who endorses this test, acknowledges that "[t]his assertion might be taken as implying that duopoly is synonymous or consistent with effective competition, a

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[81] That is both because, in their view, "unbundling [in general] is a departure from the normal operation of a competitive marketplace" (*see* U S WEST at ii) – an observation that has no apparent relevance to the monopoly local exchange – and because of their hostility to the TELRIC pricing principles that the Act and the Commission's rules require be applied to unbundled network elements. Indeed, their arguments against unbundling rely heavily on their claim that TELRIC does not fairly compensate them – a claim the Commission has properly rejected. *Compare* USTA at 22 ("The Commission must also consider the adverse impact that TELRIC pricing of ILEC UNEs has on competition and innovation"); Kahn Aff. ¶ 22 (same); BellSouth at 8 n.6 (same); Hausman/Sidak Aff. at 66-70 (same) *with First Report and Order* ¶¶ 733-740.

[82] *See* Kahn Aff. ¶ 9.

proposition that in itself most economists would probably be unwilling to accept."[83] Nonetheless, he contends, the presence of even a single competitor can still "make a very significant difference" in the market and, "more directly pertinent," the presence of a duopoly establishes "that the network elements of the incumbent are not 'essential.'"[84]

Here, the incumbent LECs ignore not only the language of the Act, but its purposes as well. The 1996 Act did not seek to create the supracompetitive prices of a duopoly, but rather sought to create "competition among multiple providers of local service" so that prices would be driven down to competitive levels.[85] If the presence of a duopoly establishes under the antitrust laws that facilities are not "essential," that does not mean the Act's objectives are satisfied if a duopoly emerges. To the contrary, it simply confirms that the "essential facilities" doctrine cannot be the test under the Act.[86]

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[83] *See id.*

[84] *See id.*

[85] *See Iowa Utils. Bd.*, 119 S. Ct. at 726.

[86] Similarly, the incumbent LECs repeatedly emphasize the exceptionally narrow scope of sharing obligations under the antitrust laws, and ask the Commission to infer therefore that similar restrictions apply under the 1996 Act. *See, e.g.*, GTE at 19 (essential facilities standard "mandates the strictest limits on any compelled sharing of facilities. 'Compulsory access, if it exists at all, is and should be very exceptional'"); USTA at 28 (relying on essential facilities doctrine for "a standard that provides for unbundling only if competition is impossible in the absence of unbundling"); U S WEST at 6-7 (essential facilities doctrine would preclude access to the incumbent's facilities except where access "is truly *essential* to the development of competition") (emphasis in original). To the contrary, the narrowness of the obligation under the essential facilities doctrine is powerful proof that it does not apply to the far broader obligations imposed by the 1996 Act.

B. The Incumbent LECs' Other Proposed Standards For "Impairment" Likewise Violate The Plain Language Of The Act And Its Purposes.

The incumbent LECs' other proposed standards fare no better. As AT&T demonstrated in its Comments, the "impair" standard, by its terms, requires the Commission to make a comparison. "Impair" means "to make worse; to diminish in quantity, value, excellence, or strength."[87] In determining whether "the failure to provide access" to a network element would diminish or make worse "the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer," the Commission must compare CLECs' ability to provide their desired services if access to the element is provided with their ability to do so if the incumbent LECs "fail[] to provide access."[88] If CLECs are unable to provide service in the absence of a LEC network element as quickly, as broadly, or as effectively as they otherwise could, then the failure to provide such access "impairs" them.[89]

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[87] *See* AT&T at 28-29 (quoting Webster's Third New International Dictionary at 1131); *see also* Illinois CC at 6 ("impair" means "to make worse by or as if by diminishing in some material respect").

[88] *See* 47 U.S.C. § 251(d)(2)(B); *see also* CompTel at 2 (impairment exists "if use of an externally supplied element as compared to use of the incumbent local exchange carrier's element exhibits a material difference in either cost, time to provision service, or the number or scope of customers to whom the service would be provided"); C&W at 10-12; Sprint at 10-11; TRA at 22-23; Ad Hoc at 4-6; Level 3 at 5-7; MediaOne at 8-9; CoreComm at 12-12-13; e.spire at 6-7; KMC at 5-6; Rhythms NetConnections at 8; Prism at 15.

[89] By contrast, the Commission in the *First Report and Order* did not explicitly find that the failure to provide access to the seven network elements would impair CLECs' "ability to provide . . . services" as opposed to their profits, and did not exclude the possibility that some increases in cost would not impair that ability. *See AT&T* v. *Iowa Utils. Bd.*, 119 S.Ct. 721, 735 (1999) ("An entrant whose anticipated annual profits from the proposed service are reduced from 100% of investment to 99% of investment has perhaps been 'impaired' in its ability to amass earnings, but has not *ipso facto* been 'impair[ed] . . . in its ability to provide the services it seeks to offer'").

The incumbent LECs do not even attempt the comparison mandated by Section 251(d)(2). Instead, they propose standards which reject the notion that any such comparison must be made, and which are thus completely disassociated from the statutory language they purport to be applying. In addition to seeking to import the essential facilities doctrine from the antitrust laws, the incumbent LECs uniformly rely upon a single out-of-context citation from paragraph 315 of the *First Report and Order*. In that paragraph, the Commission stated that Section 251(c)(3)'s requirement that access to network elements be provided on "just, reasonable, and nondiscriminatory" terms "require[s] incumbent LECs to provide unbundled elements under terms and conditions that would provide an efficient competitor with a meaningful opportunity to compete."[90] The incumbent LECs claim that the standard for Section 251(d)(2)(B) should likewise be whether CLECs, deprived of access to a network element, would have "a meaningful opportunity to compete."[91]

The incumbent LECs' reliance on Paragraph 315 is both misplaced and ironic. It is misplaced because Paragraph 315 did not purport to construe Section 251(d)(2)(B) and, like GTE's proposed standard, bears no connection to the terms of that provision. It is ironic because even the incumbent LECs' proposed new standard, if applied according to its terms (as opposed to how the incumbent LECs apply it), would itself require the unbundling of the seven original network elements.

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[90] *See First Report and Order* ¶ 315.

[91] *See, e.g.*, Bell Atlantic at 9 (quoting *First Report and Order* ¶ 315); SBC at 3-4 (same); U S WEST at 11 (same); BellSouth at 22 (same); Ameritech at 21 (same).

The passage of the *First Report and Order* on which the incumbent LECs rely was written to explain why the requirement that network elements be provided on "just, reasonable, and nondiscriminatory terms" required not merely that incumbent LECs treat all CLECs equally, but also that CLECs obtain terms and conditions that are equal to what the incumbent LECs provide to themselves. Otherwise, the Commission explained, CLECs would be denied a "meaningful opportunity to compete." The Commission thus recognized that the competitive disadvantage suffered by the CLEC if its access to facilities is obtained on terms less advantageous than those available to the incumbent LEC will *itself* be sufficient to deny the CLEC a "meaningful opportunity to compete."[92]

It is thus incoherent for U S WEST, for example, to embrace this standard while at the same time asserting that Section 251(d)(2) "does not ask whether these prices and terms [under

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[92] The Commission explained:

> We also conclude that, because section 251(c)(3) includes the terms "just" and "reasonable," this duty encompasses more than the obligation to treat carriers equally. Interpreting these terms in light of the 1996 Act's goal of promoting local exchange competition, and the benefits inherent in such competition, we conclude that these terms require incumbent LECs to provide unbundled elements under terms and conditions that would provide an efficient competitor with a meaningful opportunity to compete. Such terms and conditions should serve to promote fair and efficient competition. *This means, for example, that incumbent LECs may not provision unbundled elements that are inferior in quality to what the incumbent provides itself because this would likely deny an efficient competitor a meaningful opportunity to compete.* We reach this conclusion because providing new entrants, including small entities, with a meaningful opportunity to compete is a necessary precondition to obtaining the benefits that the opening of local exchange markets to competition is designed to achieve.

First Report and Order ¶ 315 (emphasis added).

which CLECs obtain facilities from other sources] are better or worse than those that would be available from the incumbent; it simply asks whether they are *adequate* to permit competition."[93] The Commission's central point in Paragraph 315 is that, if CLECs must labor under conditions that are (in U S WEST's words) "worse than those that would be available from the incumbent," those conditions will *not* be "adequate to permit competition." The Commission thus implicitly recognized what the Supreme Court held it had failed to make explicit in its subsequent discussion of impairment: under current market conditions, CLECs that are forced to incur higher costs or use poorer quality facilities than the incumbent LEC will not be able to wrest customers from it, and potential CLECs who know they will be facing such conditions will not even try.

The incumbent LECs nonetheless appear to have seized upon this standard (stripped of its context) because they believe that by asking, in the abstract, whether CLECs have "a meaningful opportunity to compete," they can (a) avoid confronting the comparison between CLECs with network elements and CLECs without network elements that the statute requires, and (b) claim there is no "impairment" so long as a few CLECs can compete for a small number of customers in narrow market segments. Indeed, much of their presentations consist of urging the Commission to adopt a series of "exclusionary rules" against considering certain critical categories of evidence that would be relevant to the required comparison and thus simply ignore the many different respects in which CLECs would plainly be impaired (and denied even "a meaningful opportunity to compete") without access to network elements. For example:

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[93] *See* U S WEST at 10-11 (emphasis in original).

The inability to offer mass-market competition. Ameritech contends that a Commission determination that "wide-scale entry" would be "impossible" without network elements (but possible with network elements) is irrelevant because CLECs can always "pursu[e] a narrow entry strategy" instead.[94] Indeed, Ameritech notes that "[s]ome of the most successful CLECs are the smallest ones."[95] That same position is implicit in the presentations of GTE and the other incumbent LECs that rely on the *Huber Submission.* Each of them regards a demonstration that CLECs can provide service through their own facilities to niche markets of high-volume business customers as sufficient to establish that those CLECs have a "meaningful opportunity to compete" without access to network elements – and thus, under the incumbent LECs' proposed test, that those CLECs would not be impaired if access were denied. *See supra* Part I. But that position is, of course, completely contrary to the Act and would defeat its principal objectives. If a CLEC seeks to offer mass market competition but is instead limited to "narrow" entry strategies and market segments by the incumbent LECs' failure to make network elements available, then it patently will be impaired in its ability to "provide the services that it seeks to offer."[96] And if local

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[94] *See* Ameritech at 60. That is also the entry strategy examined by Ameritech's affiant – to the exclusion of other strategies contemplated by the Act. *See* Baranowski/Klick/Pitkin Aff. ¶¶ 5-7.

[95] *See* Ameritech at 60.

[96] *See* 47 U.S.C. § 251(d)(2)(B); *see also* Memorandum Opinion and Order, *In the Matter of the Public Utility Commission of Texas, Petitions for Declaratory Ruling and/or Preemption of Certain Provisions of the Texas Public Utility Regulatory Act of 1995*, 13 FCC Rcd. 3460, 3498 ¶ 78 (1997) ("[S]tatewide entry is consistent with Congress' goal of rapid and widespread entry by new competitors in the local exchange market. And Congress expressly recognized that construction of redundant networks would be very costly and time-consuming, and therefore provided requesting carriers with the right to obtain nondiscriminatory access to unbundled network elements . . . .").

exchange competition is limited to those segments and if other consumers are denied the benefits of competition, then the Act will have been a failure.

The inability to connect a facility efficiently to the network. SBC contends that each element must be "judged in isolation" – by which it means that the Commission should consider only whether a CLEC can obtain an element from an alternative source on a stand alone basis, and cannot consider whether the CLEC would actually then be able to connect that element to the remainder of its network.[97] Thus, as long as a CLEC can *obtain* a switch, for example, it need not be able actually to *use* the switch. The point of this argument, explicitly acknowledged by SBC, is to take off the table the reality that difficulties in connecting unbundled loops to CLEC switches are among the factors that make CLEC switches unusable for mass market residential competition and will require CLECs instead either to purchase unbundled switching or to forego competing for those customers.[98]

To state SBC's argument is to refute it. The Commission has held that the "access to network elements" required by Section 251(c)(3) "refers to both the physical or logical connection to the element and the element itself."[99] Accordingly, even "judged in isolation," the Commission would have to look at the connections between the element and adjacent facilities in determining whether the failure to provide "access to such network elements" (47 U.S.C. § 251(d)(2)(B)) would create an impairment. Most fundamentally, the inquiry under Section

[97] *See* SBC at 9-11.

[98] *See id.* at 10-11.

[99] *See First Report and Order* ¶ 312.

251(d)(2)(B) is not whether CLECs will be impaired in their ability to obtain a facility, but whether they will be impaired in their ability to "provide . . . services." Individual facilities are useful in providing service only insofar as they can be effectively connected to, and can interoperate with, the other parts of a network. SBC's proposed exclusionary rule would arbitrarily eliminate from consideration facts that are absolutely essential to that determination.[100]

Delay. U S WEST urges the Commission to ignore delays that CLECs would experience in their ability to provide service as it considers whether that ability would be impaired if network elements were unavailable. U S WEST suggests three grounds for this startling claim. It argues that the fact that some CLECs are using their own facilities to provide some services today "conclusively demonstrates" that delays that accompany self-provisioning do not "preclude" the development of competition; that there will always be some "inherent" delay in self-provisioning and therefore relying on delay to find an impairment would "gut" the impairment standard; and that taking delay into account would require the Commission to make "administratively complex determinations."[101]

These arguments are meritless. First, the fact that competition will not be absolutely "precluded" – *i.e.*, that some CLECs will still be able to provide some service to some customers in some areas – is hardly the test; the issue is whether CLECs' ability to provide service will be

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[100] Notably, even SBC does not take its argument seriously. Observing that "[s]ignaling is a servant to switching," SBC acknowledges that a purchaser of unbundled switching must be given access to unbundled signaling. *See* SBC at 43. That is undoubtedly the case. But it is not a conclusion that can be reached by judging network elements "in isolation."

[101] *See* U S WEST at 22-23.

"impaired." And if a CLEC experiences greater delay in providing service without access to a network element than with access to the network element, then it is certainly "impaired" within the "ordinary and fair meaning" of the term.[102] Second, there is not necessarily any "inherent" additional delay in ordering facilities from a non-incumbent LEC as compared to ordering facilities from an incumbent LEC. If there is greater delay at present, it is because there is not yet a mature wholesale market for those facilities – and that is precisely the type of consideration the Commission must take into account in assessing whether CLECs will be impaired by being denied access to the incumbents' facilities. Finally, the suggestion that examining delay is too "administratively complex" is a makeweight. To the contrary, it is a fairly easy and straightforward task, particularly in light of the undisputed evidence in the record thus far regarding the substantial delays that CLECs would experience without access to certain network elements.[103]

In that regard, it bears emphasis that the problems of delay in providing service do not involve trivial differences of a few days or weeks. They also are not limited to delays in the date on which a CLEC can first *enter* a market (although such delays themselves warrant a finding of

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[102] *See Iowa Utils. Bd.*, 119 S. Ct. at 725.

[103] Like U S WEST, Ameritech also urges the Commission to tolerate a substantial imposition of delay upon CLECs. Relying on the Department of Justice Merger Guidelines, Ameritech recommends that the Commission hold that if a CLEC could enter a market in two years without network elements, it is not impaired by the failure to grant access even if it could enter in a matter of months if it were granted access. *See* Ameritech at 35; *see also* BellSouth at 15-16. But the CLEC is obviously "impaired" by the unavailability of network elements during any portion of that two year period when it otherwise would have been able to enter – indeed, for that period it is not only "impaired" but "foreclosed." The Merger Guidelines do not seek to measure when a competitor would be "impaired," and are entirely irrelevant to that inquiry.

impairment). The delays AT&T has discussed – such as those involved in obtaining building access and right-of-way agreements to lay fiber (*see infra* pp. 81-84, pp. 122-23) are substantial delays and ones that would be imposed on a recurring, ongoing basis as to CLECs that have already "entered" a market and are seeking to win new customers, to build and connect facilities for those customers, and to compete with the incumbent LECs in offering timely commitments for due dates when those customers are choosing a carrier. As the Commission has frequently recognized, the inability to match the incumbent LEC in the ability to offer timely service would be an enormous competitive disability.[104]

Inability to match the incumbents' economies of scale and other cost disadvantages. Finally, all of the incumbent LECs assert that the Commission should not take into account whether, in the absence of access to a network element, incumbent LECs will have superior economies of scale and other cost advantages that will impair a CLEC's ability to compete with them.[105] These assertions are frivolous. The incumbents' cost advantages and the superiority of their economies of scale constitute the very economic barriers that made competition impossible prior to the 1996 Act, and that Congress sought to eliminate through the network element requirements of Section 251(c)(3).[106] And as the Commission explained in the *First Report and*

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[104] *See, e.g., First Report and Order* ¶ 518; Memorandum Opinion and Order, *Application of BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Louisiana*, 13 FCC Rcd. 20599, 20653 (1998).

[105] *See, e.g.*, SBC at 8-9; Bell Atlantic at 14; GTE at 23-24; BellSouth at 11-12; U S WEST at 16; Ameritech at 29.

[106] As Covad observes (at iii), "Congress ordered that ILECs unbundle their networks because – as a result of their historical government granted monopoly – those incumbent networks possess (continued . . .)

Order, in a passage otherwise relied on heavily in this proceeding by the incumbent LECs (*see supra* pp. 38-40), unless an entrant can obtain facilities on the *same* terms and conditions as the incumbent – including costs – it will not have a "meaningful opportunity to compete."[107]

Indeed, as Professors Hubbard, Lehr, and Willig explained in their initial Affidavit, a firm that has higher costs than its rivals cannot survive in a competitive market. Competition will drive prices below that firm's costs and force it out. Moreover, any potential entrant that knows that its costs will be systematically higher than its competitors, recognizing the economic realities, will not enter in the first place. Accordingly, if a CLEC will face costs that exceed the incumbent LEC's TELRIC, then it will be foreclosed from successfully competing. In that circumstance, the cost difference it will face will not diminish any CLEC's ability to earn supracompetitive profits (in the Supreme Court's example, from 100% to 99%), but instead will jeopardize its ability to earn even a normal return on its investment, and consequently any plan it has to enter.[108]

For these and other reasons, it should not ultimately matter for the outcome of this proceeding whether the Commission undertakes the comparison required by Section 251(d)(2)(B) between CLECs' ability to provide service when they are granted access to network elements and their ability to do so when they are not, or instead applies the incumbent LECs' nonstatutory test

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(. . . continued)
economies of scale, scope, density and connectivity that cannot feasibly be replicated by other providers. If competing carriers are not able to share those economies, the ILECs would have an insurmountable competitive advantage once the local market was opened to competition." *See also* Qwest at 9; Prism at 5-6.

[107] *See First Report and Order* ¶ 315.

[108] *See* Hubbard/Lehr/Willig Aff. ¶¶ 18-26; Hubbard/Lehr/Ordover/Willig Reply Aff. ¶¶ 52-55.

under which it would merely ask in the abstract whether CLECs have a "meaningful opportunity to compete." Under either test, the result would be the same. If a CLEC is unable to provide mass market services, unable to connect its facilities efficiently with the rest of its network, unable to provide service without suffering delays that customers of the incumbent LECs do not experience, or unable to match the economies and lower costs of the incumbents, then it clearly is "impaired" and does not have "a meaningful opportunity to compete."

C. Contrary To The Incumbent LECs' Claims, The Act Expressly Does Not Require The Commission To Give The Section 251(d)(2) Factors Controlling Weight.

As AT&T explained in its Comments, Section 251(d)(2) merely lists factors that the Commission must "consider, at a minimum." The Commission is not required to give those factors any particular weight.[109] For example, even if the Commission were not to conclude that any increase in cost constitutes an "impairment" under Section 251(d)(2)(B), it would still be free to – and in that circumstance should – order unbundling whenever CLECs would otherwise incur higher costs so as to further Congress' objective of bringing lower prices to consumers.[110] Indeed, the Commission is not only permitted, but required, to consider any factors in addition to those specifically listed that would advance "the objectives of the Act."[111]

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[109] *See* AT&T at 37; *see also* Covad at 9-10, 24-25; MCI WorldCom at 9-10; Qwest at 43-45; Sprint at 26; ALTS at 31-32; CoreComm at 4; C&W at 20-22; KMC at 11-12; Allegiance at 13-14; CPI at 11-12; Level 3 at 13-14; Choice One at 13-14.

[110] *See* AT&T at 37-38.

[111] *See Iowa Utils. Bd.*, 119 S.Ct. at 736.

Although this reading of Section 251(d)(2) is the only conceivable construction of the language, the incumbent LECs' nonetheless resist it. Ameritech, for example, contends that the Section 251(d)(2) factors must be given "controlling weight" such that the Commission may not require unbundling where that section's "test" is not met.[112] Similarly, GTE claims that "[b]y requiring the Commission to consider *at a minimum* the 'necessary' and 'impair' standards when determining which elements to unbundle, section 251(d)(2) expressly sets out baseline criteria that must be satisfied before a sharing obligation can be imposed."[113]

These claims are baseless. The statute does not say the Commission must "find, at a minimum," but rather that it must "consider, at a minimum." And the case law is clear on what that means. When a "statute by its terms merely requires the Commission to consider" specific factors, "[t]hat means only that it must 'reach an express and considered conclusion' about the bearing of a factor, but is not required 'to give any specific weight' to it."[114] The Eighth Circuit agrees with the D.C. Circuit on this point, holding that where a statute requires an agency to "consider" certain factors, "the weight to be given [them] is a matter of discretion."[115]

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[112] *See* Ameritech at 45-48.

[113] *See* GTE at 28 (emphasis in original). Remarkably, GTE takes the position that the Commission may depart from those factors if other considerations would lead it to *restrict* unbundling that the factors would otherwise support, but may not depart from those factors if other considerations would lead it to *order* unbundling that the factors alone would not support. *See id.* GTE does not even attempt to explain how the statutory language could possibly be read to support such an anticompetitive one-way ratchet.

[114] *See Time Warner Entertainment Co.* v. *FCC,* 56 F.3d 151, 175 (D.C. Cir. 1995) (citation omitted).

[115] *See Jones* v. *Bureau of Prisons,* 903 F.2d 1178, 1183-1184 (8th Cir. 1990).

Indeed, the D.C. Circuit construed in precisely this way statutory terms virtually identical to the "consider, at a minimum" language of Section 251(d)(2). In *Central Vermont Ry., Inc.* v. *ICC*, 711 F.2d 331, 335 (D.C. Cir. 1983), the Court of Appeals construed provisions of the Interstate Commerce Act which required the ICC to "consider at least" a series of statutory factors when reviewing a proposed merger, including "whether the proposed transaction would have an adverse effect among *rail carriers* in the affected region." *Id.* (quoting 49 U.S.C. § 11,344(b)(1)(E)) (emphasis in *Central Vermont Ry*). In response to a claim that the ICC had failed to adhere to the statute because it had "relied on *truck* competition to ameliorate the substantial lessening of *rail* competition" caused by a merger, *id.* (emphasis in original), the Court held that the statute "permits the [ICC] to consider factors other than those specifically listed," and may give those other factors "*dominant weight*." *Id.* at 335-336 (emphasis added).[116]

Both GTE and Ameritech attempt to rely on *Iowa Utilities Board* for their contrary claim, but that case provides them no support. Following the statutory language, *Iowa Utilities Board* remanded Rule 319 to the Commission because the Commission, it held, had failed "adequately" to "*consider*" the statutory factors.[117] The Commission failed, the Supreme Court held, not

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[116] *Central Vermont Ry* easily disposes of Ameritech's attempt to distinguish *Time Warner*. Ameritech contends that *Time Warner* is inapposite here because *Time Warner*, according to Ameritech, involved statutory "factors" (*e.g.*, rate history) while Section 251(d)(2) lists "standards" (*e.g.*, whether a proprietary element is necessary). *See* Ameritech at 47 n.107. Even if that distinction were meaningful, *Central Vermont Ry* – which was cited and relied upon in *Time Warner* (56 F.3d at 175) – involved "standards" as Ameritech uses that term. *See Central Vermont Ry*, 711 F.2d at 335 (construing provision directing the ICC to consider "whether the proposed transaction would have an adverse effect among rail carriers in the affected region").

[117] *See Iowa Utils. Bd.*, 119 S. Ct. at 734 (emphasis added).

because it had declined to give those factors dispositive weight, but because it had misconstrued their terms – and an agency cannot properly "consider" a standard if it misinterprets it.[118] The Court assuredly did not hold that the factors had to be given dispositive weight, and there would have been no reason for it to do so – since *both* sides in the case agreed in their briefs, contrary to several of the incumbent LECs' positions here, that dispositive weight was not required.[119]

D. There Is No Basis For An Automatic Sunset, But The Commission Should Periodically Review Its List Of Elements To Determine Whether Modifications Should Be Made.

Finally, the Commission should reject the incumbent LECs' suggestion that it set an automatic two-year sunset – or any other automatic sunset – for the unbundling obligations it establishes here. An automatic sunset would encourage the incumbent LECs' to drag their feet on complying with their obligations in anticipation of the sunset date.[120] Moreover, the Commission has no non-arbitrary basis at this time to determine when the unavailability of access to network elements will cease to impair CLECs. As the Illinois Commerce Commission points out, "[i]n the three years since the implementation of the Act, no incumbent LEC has satisfied the competitive checklist established in § 271. Given the current state of competition, . . . determining a date certain or sunset date for the elimination of UNEs from the national list would be extremely

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[118] *See id.* at 734-736.

[119] *See* Reply Brief of Cross-Petitioner U S WEST, Inc. at p. 5, *AT&T Corp.* v. *Iowa Utils. Bd.* (filed July 17, 1998) ("no one claims these standards must always receive dispositive weight"); *accord*, Reply Brief for Cross-Petitioners Bell Atlantic, BellSouth Corp., and SBC at p. 21, *AT&T Corp.* v. *Iowa Utils. Bd.* (filed July 17, 1998).

[120] *See, e.g.*, MCI WorldCom at 12.

difficult."[121] The Oregon Public Utility Commission thus aptly observes that the setting of a sunset date now would constitute "an arbitrary abdication of the FCC's responsibilities under the Act."[122]

The Commission should instead conduct a periodic review of its network element rules to determine whether any additions, subtractions, or clarifications are warranted in light of changed market conditions, changed technology, or further experience. AT&T agrees with MCI that the period should be long enough "to enable CLECs to plan their business strategies with reasonable certainty," and that a three-year period would strike an appropriate balance.[123] Further, AT&T agrees with CompTel that, in the event such a review leads to a network element being withdrawn from the list, the Commission should provide for orderly transition procedures to ensure that customers and carriers that are using the network element are not abruptly left in the lurch, but instead have some reasonable period of time to make alternative arrangements.[124]

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[121] *See* Illinois CC at 15-16; *see also* MCI WorldCom at 12 ("no evidence on the record suggests that the Commission can predict today with any accuracy that conditions will have changed sufficiently at some point in the future such that a particular unbundling obligation will no longer be necessary").

[122] *See* Oregon PUC at 4; *see also* MediaOne at 19-21; Sprint at 43-44; KMC at 28; CPI at 32-33; RCN at 26-27; Choice One at 27; Illinois CC at 15.

[123] *See* MCI WorldCom at 13.

[124] *See* CompTel at 55. Relatedly, GTE and U S WEST contend that Section 252(i) – what they have labeled the "pick-and-choose rule" – should not apply to a network element provision in an interconnection agreement after that network element has been removed from the list. *See* GTE at 29-30; U S WEST at 65-66. Like their last position on Section 252(i), this contention is precluded by Section 252(i)'s plain language and statutory purpose. *See Iowa Utils. Bd.*, 119 S. Ct. at 738. In addition to the dispositive fact that the terms of Section 252(i) leave no room for the loophole that GTE and U S WEST seek to create, the whole point of Section 252(i) is to ensure nondiscrimination and equal treatment among CLECs. It would violate that core principle (continued . . .)

III. THE COMMISSION SHOULD ADOPT A BINDING LIST OF MINIMUM NETWORK ELEMENTS THAT MUST BE MADE AVAILABLE ON A NATIONAL BASIS AND ALLOW STATES TO SUPPLEMENT THIS LIST WITH ADDITIONAL ELEMENTS AND SUBELEMENTS, BUT NOT TO REDUCE IT.

The *First Report and Order* concluded that the 1996 Act required the Commission to (1) prescribe a minimum set of network elements that would unconditionally be made available throughout the nation and would bind the states in arbitration proceedings (¶¶ 241-248) and (2) allow each individual state also to order incumbent LECs to provide access to additional elements or subelements that are not on the national list (¶ 244). Neither of these determinations was challenged in the prior appeals. However, a number of incumbent LECs and several states have contended that *AT&T v. Iowa Utilities Board* somehow requires or supports vacating these determinations. The *Notice* thus sought comment on these issues, after tentatively concluding that it should maintain each of these requirements. As explained in detail below, the comments have now vividly confirmed that the *Notice*'s tentative finding is correct and that it is required by the law, elementary principles of economics, and the objectives of the 1996 Act alike.

A. The Commission Should Adopt A National List Of The Minimum Network Elements That Must Be Made Available Throughout The Nation *Without* Any Localized Determinations Of Necessity Or Impairment.

With the exception of the incumbent LECs and several state utility commissions, all the commenters (including many states) have supported the Commission's tentative conclusion that it

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if one CLEC were able to obtain a network element through its interconnection agreement and others were not able to obtain that element on the same terms (and all the more so if they were unable to obtain it at all). *See* Cal. PUC at 9 n.2.

should again adopt a binding list of minimum network elements that must be made available nationally. These comments make detailed showings of why any other rule would not only violate the Act, but also burden CLECs with uncertainty, delays, and transaction and litigation costs that would severely impair – and likely preclude altogether – the ability of many or even all CLECs broadly to provide competing exchange and exchange access services through network elements.[125]

However, two sets of commenters have opposed the adoption of a national binding minimum list of elements and have contended that states (and perhaps even the Commission) must or should make "localized" market by market and element by element determinations of whether and to what extent the ability of CLECs to provide service would be impaired if access to the elements were denied. First, although other states support a binding nationwide minimum list of elements, some state commissions (and some incumbent LECs) have urged the Commission to adopt a rule that declares that the elements from original Rule 51.319 are "presumptively available" nationally, but that allows individual states to determine that all or some of these elements will not be available to all or some carriers to serve all or some customers in all or some portions of individual states. Second, other incumbent LECs have urged that the Supreme Court's decision requires a two-step approach in which (1) the Commission makes "market-by-

[125] *See, e.g.*, Net2000 at 2-6; MGC at 5-8; C&W at 23-28; Qwest at 38-42; Level 3 at 2-3; Rhythms NetConnections at 8-9; Prism at 3-4, 9-10; Metro One at 5-9; NEXTLINK at 3-5; MediaOne at 4-6; Ad Hoc at 12; CoreComm at 8-10; Sprint at 7; e.spire at 7; ALTS at 3-6; Excel at 16-19; GSA at 3-4; KMC at 2-3; McLeod at 2-3; CPI at 4-7; OpTel at 2-3; TelTrust at 2; Northpoint at 1-3; RCN at 3-5; Choice One at 2.

market" and "element-by-element" determinations of whether and when individual elements should be provided to any individual CLECs and (2) each individual state commission then decides whether a particular CLEC's request for a particular incumbent LEC element in fact encompasses the "market" and "element" in which CLECs' have rights of access under the Commission's national rules.

Adoption of either proposal would impair and likely altogether preclude the ability of many or all CLECs to provide service through incumbent LEC network elements. Each would, in different ways, burden CLECs with uncertainty over the availability of elements, the costs of protracted litigation, and protracted delays before any elements could be obtained to serve many customers. Those are the reasons the *First Report and Order* adopted a minimum list of elements that must be nationally available. Those are also the reasons that the state utility commissions in Illinois, California, Connecticut, Washington, and Kentucky have urged the same position in their comments.[126] Intervening events have dramatically underscored the vital importance of this requirement and why the Commission should not and could not adopt either proposal.

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[126] *See* Illinois CC at 2 (a mandatory national list should be adopted because it list would "promote competition in the local exchange market," "assist the States in conducting arbitrations," and "reduce the likelihood of litigation); Cal. PUC at 3 ("supports the creation of a list of unbundled network elements that, at a minimum, would be mandated on a national basis. Such a list would allow multi-state competitors to create a national business plan, with the certainty of knowing that a discrete set of network elements will be available in all states. A national list of minimum unbundling requirements also facilitates the arbitration process in individual states. The condensed time frame allow for arbitrations under the 1996 Act would make it difficult for state commissions to define which unbundled elements are to be included in each and every case");.Connecticut DPUC at 3 (national list would "facilitate competition at the local level and minimize entrants' cost by taking advantage of economies of scale as they enter multiple local markets" and would "facilitate arbitration by reducing the number of issues that would be subject to CTDPUC review"); Kentucky PSC at 1 (while States should have responsibility for addressing new network elements in the future, the Commission should adopt a (continued . . .)